



Michael D. Silverman
Executive Director

March 14, 2011

BY HAND

Senator Jon Sonju
State Senate of Montana
1301 East 6th Avenue
Helena, Montana 59601

Re: House Bill 516

Dear Senator Sonju:

We understand that you will be considering House Bill 516 ("HB 516") in a hearing of the Senate Local Government Committee today. We write to bring to your attention concerns about the bill's constitutionality. We do not attempt to address every defect in the bill in this letter. We have chosen instead to highlight just some of the ways that HB 516 runs afoul of prohibitions contained in the United States Constitution. We hope that you will give these concerns due consideration.

HB 516 is meant to do one thing only: to make it impossible for transgender and gay Montanans to seek protection from discrimination in the cities and towns where they live. It suffers from at least two constitutional infirmities. First, it is motivated solely by animus towards transgender and gay people, which is a constitutionally impermissible basis for legislation. Second, it deprives transgender and gay people of their right to participate in the political process and seek help from their local governments. That privation - which turns transgender and gay Montanans into strangers to a broad swath of Montana's government - is by itself a violation of constitutional guarantees of equal protection.

What HB 516 Does

HB 516 would prohibit a local government from passing an “ordinance, resolution, or policy” prohibiting discrimination on any grounds “not specifically included as a protected class under the provisions of [part 1 of the Montana Human Rights Act.]”¹ The Montana Human Rights Act prohibits discrimination “because of race, creed, religion, color, sex, physical or mental disability, age, or national origin.”² Because sexual orientation and gender identity and expression are not specifically included as protected classes in part 1 of the Montana Human Rights Act, HB 516 would strike down all local legal protections from discrimination that transgender and gay Montanans currently rely upon.

Hundreds of thousands of Montanans live in a jurisdiction where local authorities – the cities, counties and school boards who are most directly responsive to local concerns – have enacted civil rights ordinances and non-discrimination policies that would be affected by HB 516. Montana citizens have spoken through their local governments, indicating their desire for protections against discrimination for a broader range of groups than those specifically covered by part 1 of the Montana Human Rights Act. HB 516 would invalidate these laws to the extent that they offer such groups protection. Affected laws include the anti-discrimination ordinances and policies of the cities of Shelby,³ Bozeman,⁴ Kalispell,⁵ and Missoula.⁶ They include non-discrimination policies in a great number of school districts, including Billings,⁷ Bozeman,⁸ Chinook,⁹ Glendive,¹⁰ Havre,¹¹ Missoula,¹² and West Yellowstone,¹³ to name only a few. They include the personnel policies of Park County,¹⁴ Gallatin County¹⁵ and Missoula County,¹⁶ which would be substantially gutted by HB 516. Even the non-discrimination clause of the gambling licensing law of the City of Choteau would be affected.¹⁷ All of these laws and policies protect people from discrimination based on gender identity and

¹ HB 516, § 1.

² Mont. Code Ann. § 49-1-102(1) (2009).

³ Shelby Mun. Code § 1-10-3 (2010).

⁴ Bozeman City Employee Handbook, Attachment B.

⁵ Kalispell Mun. Code § 5A-3 (2010).

⁶ Missoula Mun. Code tit. 9-64 (2010).

⁷ Billings Sch. Dist. Policy 5002 (“Equal Employment Opportunity and Non-Discrimination Policy”); Billings Sch. Dist. Policy 3210 (“Equal Education Opportunity Policy”).

⁸ Bozeman Schools, Policy (“Equal Education, Nondiscrimination and Gender Equity”).

⁹ Chinook Schools, Student Handbook 30 (“Bullying and Harassment Policy.”)

¹⁰ Glendive School District, Policy 5010 (“Equal Employment Opportunity and Non-Discrimination”); Glendive School District, Policy 3210 (“Equal Education, Nondiscrimination and Sex Equity”)

¹¹ Havre Public Schools, Technology Plan 2010-2013 29.

¹² Missoula County Public Schools, “Commitment to Equal Education and Opportunity,” *available at* <http://www.mcps.k12.mt.us/portal/Students/StudentRegistration/tabid/127/Default.aspx>.

¹³ West Yellowstone School District #69, Student-Parent Handbook 1.

¹⁴ Park County, Personnel Policy and Procedures Handbook, § 2.2.

¹⁵ Gallatin County, Employment Application Process, *available at* http://www.gallatin.mt.gov/Public_Documents/GallatinCoMT_HR/apply?textPage=1

¹⁶ Missoula County, Personnel Policies, Policy 301.00 (“Equal Employment Opportunity”)

¹⁷ Choteau Mun. Code § 4-8-28.

expression, sexual orientation, or some other ground that could no longer be protected if HB 516 became law.

HB 516's History

Last year, Missoula passed a city ordinance,¹⁸ and Bozeman a city resolution,¹⁹ that protect transgender and gay people from discrimination. Among other things, the protections were meant to address the rampant discrimination that transgender and gay people face. According to a recent nationwide survey, over one quarter of transgender people have been fired from a job because of their gender identity or expression, and nearly a fifth have been refused treatment by a doctor.²⁰ Residents of Missoula and Bozeman sought to remedy this through local legislation protecting vulnerable citizens from the discrimination that they faced. The adoption of these protections was a matter of extensive debate by elected officials and the general public.

Animus Rears its Head

Two of the strongest and most outspoken opponents of the Missoula civil rights ordinance were Dallas Erickson and Harris Himes. Mr. Erickson leads an advocacy group called Montana Citizens for Decency through Law. Mr. Himes is the Pastor of the Big Sky Christian Center in Hamilton. Their opposition to the Missoula civil rights ordinance was based squarely on their view that transgender and gay people are by definition immoral. Speaking against the then-proposed Missoula civil rights ordinance, Mr. Erickson explained: "This bill will have many consequences, if passed into law, which should concern people who care about our moral environment, especially as we slouch toward Gomorrah."²¹ Pastor Himes was equally opposed to the Missoula civil rights ordinance. Speaking at the Missoula City Council meeting during which the Missoula civil rights ordinance was discussed and eventually passed, Pastor Himes said: "I beg you, I beg you to remember also for the sake of your souls this is a sin and you should not support it."²²

¹⁸ Missoula, Mont., Ordinance No. 3428 ("Missoula civil rights ordinance").

¹⁹ Bozeman, Mont., Commission Resolution No. 4250.

²⁰ *National Transgender Discrimination Survey: Preliminary Findings 2* (Nat'l Ctr. for Transgender Equality & the Nat'l Gay & Lesbian Task Force, Nov. 2009), available at http://www.thetaskforce.org/downloads/reports/fact_sheets/transsurvey_prelim_findings.pdf; Jaime M. Grant et al., *National Transgender Discrimination Survey: Report on Health and Health Care 5* (Nat'l Ctr. for Transgender Equality & the Nat'l Gay & Lesbian Task Force, Oct. 2010), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_report_on_health.pdf.

²¹ Dallas Erickson, *Nondiscrimination ordinance: Rule is a threat to our liberties*, Missoulian, Apr. 11, 2010, available at http://missoulian.com/news/opinion/columnists/article_555bb06c-4647-11df-b8f6-001cc4c03286.html.

²² Testimony of Harris Himes, Journal of Proceedings Missoula City Council at 11, Apr. 12, 2010, available at <http://www.ci.missoula.mt.us/archives/134/100412minutes1.pdf>.

A Second Bite at the Apple

Despite this opposition, the City Council of Missoula voted to pass the civil rights ordinance into law by a margin of 10-2 on April 12, 2010.²³ The Bozeman resolution had already passed by a unanimous vote of the City Commission in January.²⁴ But the opponents of local laws that protect transgender and gay Montanans from discrimination were not content to accept the results of the democratic process. They created HB 516 with two goals in mind: first, to invalidate the Missoula civil rights ordinance and Bozeman resolution, and second, to ensure that no local government could in the future *ever* pass a law or policy that would protect transgender and gay Montanans from discrimination.

Along with the Montana Family Foundation, an anti-gay organization, Pastor Himes and Mr. Erickson approached Rep. Kristen Hansen, R-Havre, to introduce HB 516, then-numbered LC 1865, into the House of Representatives.²⁵ The file for the Bill Drafting Request that Rep. Hansen submitted to the Montana Legislative Services Division contains a handwritten note, addressed to the bill drafter. It says, "Valencia, Rep. Kristen Hansen has give[n] Harris Himes and I permission to work with you on LC 1865. Please keep us posted when you get to it." It is signed by Dallas Erickson.²⁶

HB 516 is Motivated by Anti-Transgender and Anti-Gay Animus

The bill that these anti-transgender and anti-gay activists crafted would prohibit any local government from enacting any "ordinance, resolution or policy" prohibiting discrimination on any grounds except those listed in the Montana Human Rights Act. The Montana Human Rights Act does not specifically include gender identity or expression, or sexual orientation. It also does not mention other grounds of discrimination which are prohibited by a large number of Montana local governments, such as veteran status, pregnancy, marital status, political beliefs, or cultural background.

Those other categories are just incidental, however. The point of HB 516 is to target transgender and gay people by stripping them of existing protections from discrimination, and depriving them of the right to seek protection from discrimination from their local governments in the future. The file for the Bill Drafting Request itself reveals that this has been its purpose from the very beginning. A copy of the Missoula civil rights ordinance is attached to LC 1865's Bill Drafting Request.²⁷ It contains two handwritten arrows, one pointing to the definition of "gender identity or expression" and

²³ Keila Szpaller, *Missoula City Council makes history in adopting non-discrimination law*, Missoulilian, Apr. 14, 2010, available at http://missoulilian.com/news/local/article_413f00c2-46d1-11df-9b94-001cc4c03286.html.

²⁴ Associated Press, *Bozeman adopts anti-discrimination policy*, Billings Gazette, January 13, 2010, available at http://billingsgazette.com/news/state-and-regional/montana/article_0cc1663c-0045-11df-966b-001cc4c03286.html.

²⁵ *House passes bill to strike Missoula ban on discrimination against gays*, Billings Gazette, Feb. 23, 2011, available at http://billingsgazette.com/news/state-and-regional/montana/article_ef0ba7b3-95ae-551f-bd39-0948cadd8bea.html

²⁶ HB 516 Bill Drafting File (Handwritten Notes).

²⁷ HB 516 Bill Drafting File (Missoula, Mont., Ordinance No. 3428, tit. 9.64).

the other to the definition of “sexual orientation.” It does not contain any other handwritten arrows pointing to, for example, the other protected categories in Missoula’s law that are not protected in the Montana Human Rights Act.²⁸

Indeed, HB 516’s proponents have been upfront about their discriminatory intent. Describing his lobbying efforts inside the Capitol, Montana Family Foundation’s President, Jeff Laszloffy, stated that “House Bill 516, by Representative Kris Hansen of Havre, [is] a bill to prevent municipalities from passing gay rights laws. The bill stemmed from the Ordinance passed by the Missoula City Council that made discrimination against gays, lesbians, bisexuals and transvestites illegal at the city level.”²⁹

Inside the legislative chamber, HB 516’s supporters have made themselves just as clear. Introducing the bill in the House Judiciary Committee, Rep. Hansen distributed an exhibit comparing the Montana Human Rights Act and the Missoula civil rights ordinance, pointing out explicitly that the difference at issue between the laws was the inclusion of protection for sexual orientation, gender identity and gender expression in the Missoula civil rights ordinance. She noted that “[the exhibit] shows you what the protected classes are under the Montana Human Rights Act on the left side and then you will notice that the right hand column discusses the protected classes under the Missoula ordinance ... The Missoula ordinance added to protected classes for the City of Missoula the categories or the classifications of sexual orientation, gender identity and gender expression.”³⁰ She did not mention any of the other grounds on which the Missoula civil rights ordinance prohibits discrimination that also are not specifically prohibited under the Montana Human Rights Act. Rep. Hansen could not have been clearer: HB 516 is designed to ban laws like the Missoula civil rights ordinance because they protect transgender and gay people from discrimination.

The statements of HB 516’s supporters during the House Judiciary Committee hearings echoed Rep. Hansen’s assertion that HB 516 is meant to deny any civil rights protections to transgender and gay Montanans, and to leave them vulnerable to discrimination in employment, housing and public accommodations. Pastor Himes, when pressed by Rep. Ellie Hill, D-Missoula, about whether people should be able to discriminate against transgender and gay Montanans said: “The short answer to your first question is yes. They should be able to discriminate. . . . It is God himself who says that

²⁸ The Bill Drafting Request file also contains a second handwritten note, in addition to the one authorizing Mr. Erickson and Pastor Himes to work on the legislation. This note contains the observation “49-1-102 [of the Montana Human Rights Act] doesn’t include sex[ual] orientation.” HB 516 Bill Drafting File (Handwritten Notes). This note does not list any other grounds of discrimination that Montana Code 49-1-102 does not include. At the top, in different handwriting, the note says “received from Rep. Hansen 1/7/11.”

²⁹ Audio Recording: Montana Family Foundation President Jeff Laszloffy speaking on a Montana Legislative Update “Lobbying HB 516 2-23-11” by the Montana Family Foundation at 00:45, *available at* <http://www.montanafamily.org/start.asp?file=radio&recID=347>.

³⁰ Video: Testimony from Judiciary Committee Hearings on House Bill 516 at 2:05:07, Feb 18, 2011, *available at* <http://www.leg.mt.gov/css/Committees/Session/Minutes/AudioMinutes.asp?MeetingID=12308>.

homosexuality is an abomination, and he has various punishments for that, too.”³¹ When asked what those punishments are, Pastor Himes quoted Leviticus: they “shall surely be put to death.”³²

HB 516 was voted on by the full House on February 22, and it passed by a margin of 60-39. Commenting on the thirty-nine representatives who voted against it, Jeff Laszloffy of Montana Family Foundation stated, “it’s sad to see how many legislators have walked away from God’s plan....”³³

HB 516 is Unconstitutional Because it is Motivated by Animus Against Transgender and Gay People

The United States Supreme Court has been clear: a law motivated by animus towards a group of people violates the Equal Protection Clause of the United States Constitution and cannot stand.³⁴ In *Romer v. Evans*, the state of Colorado adopted Amendment 2 to the Colorado Constitution, which forbade any local government from passing any law or policy protecting gay people from discrimination.³⁵ Amendment 2 was challenged for, among other things, violating the Equal Protection Clause of the United States Constitution, which requires, at a minimum, that a law that classifies people for different treatment must be rationally related to a legitimate government interest.³⁶

Colorado argued, among other things, that the rationale for Amendment 2 was Colorado’s “respect for other citizens’ freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality.”³⁷ Colorado further argued that Amendment 2 was rationally related to its interest in conserving resources to fight discrimination against other groups.³⁸ The Court rejected Colorado’s alleged rationales, stating that “[t]he breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.”³⁹

The Court could find no legitimate state interest related to Amendment 2, and found instead that it was “a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit.”⁴⁰ Moreover, said the Court, the inevitable conclusion was that Amendment 2 was motivated by animus towards gay

³¹ *Id.* at 2:53:17; 2:53:52.

³² *Id.* at 2:54:31.

³³ Audio Recording, *supra* note 29, at 2:50.

³⁴ *Romer v. Evans*, 517 U.S. 620, 632 (1996).

³⁵ *Id.* at 624-25.

³⁶ *Id.* at 631.

³⁷ *Id.* at 635.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

people. Such animus, the Court ruled, can *never* be a legitimate basis for enacting a law.⁴¹

United States Supreme Court precedent governs here and leads to only one conclusion: *HB 516 is unconstitutional*. It is unrelated to *any* legitimate interest of the state of Montana. As with the justifications offered in *Romer*, the justification offered for HB 516 – that it would promote a uniform statewide standard⁴² – is so far removed from what HB 516 actually does, that it is impossible to credit it.⁴³

It is clear from the factual record of HB 516's introduction that it is motivated by nothing more than animus towards transgender and gay people. That is an unlawful justification which renders HB 516 unconstitutional.

HB 516 Unconstitutionally Denies Transgender and Gay People the Right to Seek Help from their Government

HB 516 targets transgender and gay people by denying them the right to seek the government's help in fighting discrimination. It excludes them from the local political process and thereby violates the United States Constitution. In *Romer*, gay Coloradans were barred by Amendment 2 from seeking any redress from government throughout Colorado. No matter how local the grievance, gay Coloradans could get no relief from their local government under the terms of Amendment 2. They were literally locked out of the political process when it came to advocating for their own interests in fighting the discrimination that they faced.

The Supreme Court was adamant in rejecting Amendment 2 as unconstitutional. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," wrote the Court, "is itself a denial of

⁴¹ *Id.* at 634. Indeed, *Romer's* holding that animus cannot be a constitutional basis for lawmaking is a longstanding one. Nearly forty years ago, in *Department of Agriculture v. Moreno*, the Supreme Court ruled that "a bare... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." 413 U.S. 528, 534 (1973). Similarly, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court repeated that while "[p]rivate biases may be outside the reach of the law[,]... the law cannot, directly or indirectly, give them effect." 473 U.S. 432, 448 (1985) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). The Justices wrote that "mere negative attitudes or fear" cannot ever form a legitimate basis for a law. *Id.*

⁴² See Testimony of Rep. Hansen from Judiciary Committee Hearings on House Bill 516, *supra* note 30, at 2:13:10.

⁴³ See *Romer v. Evans*, 517 U.S. at 635. To the extent that HB516's proponents take refuge in their bill's silence regarding the groups it targets – transgender and gay people – that silence offers no refuge. The factual record of HB516's introduction makes it true purpose – to deny equal rights to transgender and gay people – clear. The Supreme Court will look to whether the purpose, not just the language, of the law is discriminatory. See, e.g. *Washington v. Seattle Sch. Dist. 1*, 458 U.S. 457, 471 (1981) ("Initiative 350 nowhere mentions 'race' or 'integration.' . . . [D]espite its facial neutrality, there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350.")

equal protection of the laws in the most literal sense.”⁴⁴ The Court rejected such laws as being outside the bounds of the American political tradition:

The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.... It is not within our constitutional tradition to enact laws of this sort. Central to both the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and *each of its parts* remain open on impartial terms to all who seek its assistance.⁴⁵

As Amendment 2 did in *Romer*, HB 516 targets a particular class – transgender and gay people – and makes it impossible for them to petition their local governments for redress from local discrimination. HB 516 makes transgender and gay Montanans strangers to their own government and to the local political processes that govern their everyday lives. It is unconstitutional.

Conclusion

We hope that you will consider the issues raised in this letter as you review HB 516. While other serious concerns exist about the lawfulness of HB 516 under federal and Montana law, we believe that the concerns we raise are a sufficient basis to reject HB 516. HB 516’s proponents drive its passage for one purpose: to permit discrimination against gay and transgender Montanans. HB 516 serves no legitimate government interest and is unconstitutional.

⁴⁴ *Id.*

⁴⁵ *Id.* (emphasis supplied). Indeed, the Supreme Court has long held that laws may not restrict the political process to disfavor certain groups that are seeking protection against discrimination. In *Hunter v. Erickson*, the Court struck down as violative of the Equal Protection Clause an amendment to the Akron, Ohio city charter stating that laws prohibiting housing discrimination along certain lines required approval by a referendum of voters, while laws prohibiting housing discrimination for other reasons could be passed merely by an act of the city council. The Court ruled that the Constitution bars the government from enacting legislation to “disadvantage any particular group by making it more difficult to enact legislation in its behalf.” 393 U.S. 385, 393 (1969).

Similarly, in *Washington v. Seattle Sch. Dist. No. 1*, the Court struck down a measure that would have permitted local school districts to bus their students among schools for any purpose other than racial desegregation. 458 U.S. at 487. The Court reiterated, “the Fourteenth Amendment [prohibits] a political structure that treats all individuals as equals yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.” *Id.* at 467 (internal citations and punctuation omitted). The Court especially disapproved of the state’s use of its power to deprive local governments of the authority to address discrimination. It noted that the law “burdens all future attempts to integrate Washington schools in districts throughout the State by lodging decisionmaking authority over the question at a new and remote level of government. . . . This imposes direct and undeniable burdens on minority interests.” *Id.* at 483-4.

Please contact me with any questions or concerns you may have about HB 516 or any of the issues raised in this letter. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "Michael Silverman".

Michael D. Silverman